Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

79-1901

IN THE

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Petitioner	)	
vs.	)	PETITION FOR WRIT OF CERTIORARI
PETER RODNEY BANNISTER Defendant-Respondent.	)	

PETITION FOR CERTIORARI
FROM JUDGMENT OF
COLORADO SUPREME COURT

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IN THE SUPREME COURT

OF

THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner	)	
vs.	)	ENTRY OF APPEARANCE
PETER RODNEY BANNISTER, Defendant-Respondent.	)	

COMES NOW, Robert L. Russel, and Thomas A. Barnes, Jr., and enter their appearance as counsel on behalf of The People of the State of Colorado.

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SUPREME COURT OF THE UNITES STATES

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner,	)	
vs.	)	PETITION FOR WRIT OF CERTIORARI
PETER RODNEY BANNISTER Defendant-Respondent.	)	

COMES NOW, the People of the State of Colorado, by Robert L. Russel, District Attorney, and through his duly appointed Deputy District Attorney, Thomas A. Barnes, Jr., and for their Petiton for Writ of Certiorari allege as follows:

1. A review in the Supreme Court of the United States on Writ of Certiorari is hereby requested from the judgment of the Colorado Supreme Court in Case No. 79SA556 entitled The People of the State of Colorado vs. Peter Rodney Bannister (1980). A copy of said opinion which was filed in the Colorado Supreme Court is in the appendix hereto marked as Exhibit "A".

This case involved an interlouctory appeal by The People of the State of Colorado, (hereafter referred to as "The People" or "The Prosecution")

Co. Appellate Rule 4.1(g)

(hereto marked as Exhibit "B"), specifically prohibits a Petition for Rehearing on interlocutory appeals in criminal cases. The opinion of the Colorado Supreme Court, dated March 3, 1980, was therefore a final judgment.

On the same day it issued its opinion, the Colorado Supreme Court also issued an Order of Remittitur to the trial court.

On March 18, 1980, The People filed a Motion to Vacate Remittitur, (hereto marked as Exhibit "C"). Such Motion was denied by the Colorado Supreme Court on March 28, 1980, (hereto makred as Exhibit "D").

The trial court has stopped proceedings concerning this case pending filing of this Petition for Writ of Certiorari.

2. The jurisdiction of this Court is invoked pursuant to Rule 19 (1)(a) of the Revised Rules of the Supreme Court of the United States which provides that a review on writ on certiorari may be considered "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not

in accord with applicable decisions of this court." U.S. Sup. Ct. Rule 19(1)(a), 28 U.S.C.A. 30.

The date of the judgment of the Colorado Supreme Court sought to be reviewed, and the time of its entry are March 3, 1980. Pursuant to U.S. Sup. Ct. Rule 22(1), 28 U.S.C.A. 36, "A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment."

The date of the Order which denied The People of the State of Colorado's Motion to Vacate Remittitur is March 28, 1980.

3. The questions presented for review are:

(1) Was this Honorable Court's ruling in Coolidge v. New Hampshire, 403 U.S. 443 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), intended to prohibit the search and seizure of stolen goods in plain view inside the passenger compartment of an automobile? As a corollary issue, has the Colorado Supreme Court's interpretation of Coolidge

v. New Hampshire, supra, resulted in a Colorado standard of search and seizure law, not based upon the Constitution of Colorado, which is in irreconcilable conflict with landmark holdings of this Honorable Court, including Carrol v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); and Chambers v. Maroney., 399 U.S. 42, 90 S.Ct. 1975 26 L.Ed.2d 419 (1970)

(2) When the Colorado standard pertaining to search and seizure law is based upon interpretation of the federal Constitution, should this Honorable Court require state court compliance with its rulings establishing plain view and automobile exceptions to the search warrant requirement of the federal Constitution? As a corallary issue, should this Honorable Court require state court compliance with holdings of this Court recognizing that a search warrant is not Constitutionally mandated when the hour is late, the automobile is potentially mobile, and stolen goods are in plain view?

4. The following Constitutional provision is involved in the subject case:

U.S. Const. Amend IV: "The right of the people to be secure in in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmaton, and particularly describing the place to be searched, and the persons or things to be seized."

5. In the early morning hours of October 15, 1979, Officer Lopez of the Colorado Springs Police Department observed a 1967 blue Pontiac GTO automobile going faster then the posted speed limit. The officer attempted to stop it and cite the driver for speeding, but the vehicle disappeared from the Officer's sight.

A short time later, Officer Lopez monitered a police radio dispatch which reported a theft of motor vehicle parts which had occurred in his general vicinity. The dispatch reported that among the items stolen were a number of chrome lug nuts. The report also gave a description of two persons suspected of the theft.

Soon after hearing the radio dispatch, Officer Lopez again observed the same blue Pontiac automobile at a high rate of speed enter a service station. He stopped the vehicle, then located next to several well-lit gas pumps, in order to issue its driver a traffic citation. In the vehicle were its driver and owner, defendant Bannister, and a single passenger, defendant Howarth.

As Officer Lopez approached the vehicle, both defendants exited. A conversation between the driver, Bannister, and Officer Lopez took place just outside of the left front door of the vehicle. The door was at this time closed.

Officer Lopez observed that the defendants generally matched the descriptions given in the radio dispatch, and also noted that the rear tires of the vehicle were "bald". Upon looking through the left front window into the interior of the automobile windows, he inadvertently observed several chrome lug nuts in an open glove box located between the vehicle's front bucket seats. He also observed two tire irons on the

floor boards of the back seat. All of these items were in plain view, illuminated by the lights of the service station.

Officer Lopez immediately arrested the defendants on a charge of theft of auto parts, placing them into custody in his police cruiser. He then seized the lug nuts and tire irons without benefit of a warrant.

The defendants were charged by information with the crimes of attempted theft of auto parts (felony), and theft of auto parts (misdemeanor).

Defense counsel for both defendants requested a hearing to suppress the lug nuts and tire irons seized by Officer Lopez.

The trial court suppressed the use in evidence against defendant Bannister, of the lug nuts and tire irons, citing as precedent the Colorado Supreme Court case of People vs. Neyra, 189 Colo. 367, 540 P.2d 1077 (1975). Neyra specifically relies upon the following wording from the U.S. Supreme Court case of Coolidge v. New Hampshire, supra.

"The limits on the [plain view] doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle idscussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'"

The trial court, at page three of its order, reasoned that: "no exigent circumstances existed justifying the search. The defendants had been arrested and placed in custody prior to the subject search, and their automobile was taken in police custody. Once the defendants had been arrested and their auto placed in police custody, Officer Lopez was duty bound to otain a warrant to search the defendant's vehicle. The fact that the items seized were in plain view, did not lessen the duty to obtain a warrant."

The prosecution took an interlocutory appear of the trial court's ruling to the Colorado Supreme Court specifically requesting a review of the trial court's suppression of the lug nuts and tire irons

The Colorado Supreme Court affirmed the ruling of the trial court, (see Exhibit "A"), specifically relying upon People v. Neyra, supra. and citing with approval the language in Neyra, (at 540 P.2d 1079) taken from Coolidge v. New Hampshire, supra., that "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'"

The Colorado Supreme Court, by citing Coolidge and other U.S. Supreme **Ct. decisions,** has therefore adopted its own interpretation of the federal standard pertaining to plain view searches and seizures. The state court has not cited or relied upon the Constitution of Colorado, except in dicta regarding standing to challenge the seizure.

This Petition for Writ of Certriorari, therefore, involves substantial federal questions. The following section demonstrates how the Colorado Supreme Court has decided these questions in a way which is in irreconcilable conflict with applicable decisions of this Honorable Court.

6. The Colorado Supreme Court has relied in its decision upon the following wording from the plurality opinion in Coolidge v. New Hampshire, (supra, at 403 U.S. 458):

> "The limits on [the plain view] doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances'."

The language in Coolidge relied upon by the Colorado Supreme Court was clearly never intended by this Honorable Court to prohibit the search and seizure of stolen goods in plain view inside the passenger compartment of an automobile.

This mistaken reliance upon Coolidge to justify the decision of the Colorado Court is apparent when

one notes the following language in Coolidge, appearing at 403 U.S. 471-473:

"But to extend the scope of such an intrusion to the seizure of obtects--not contraband nor stolen nor dangerous in themselves--which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

In light of what has been said, it is apparent that the 'plain view' exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves.

The seizure was, therefore, unconstitutional."

None of the factors present in Coolidge are present in the

instant case. In the case at bar, the initial stop of the automobile occurred in the early morning hours, when there was not "ample opportunity to obtain a warrant." The police did not know the automobile's description and location in advance. Perhaps most importantly, the case at bar is a case involving stolen goods.

It is obvious that Coolidge is easily distinguishable from the instant case, and that the Colorado Supreme Court's interpretation of Coolidge is markedly different from the intended holding of Coolidge.

It must be emphasized that this contorted reading of Coolidge is not stated by the Colorado Supreme Court as being founded on application of the Colorado Constitution. Reliance is instead placed upon the Fourth Amendment of the U.S. Constitution, making the Colorado holding a federal question of paramount importance to this Honorable Court.

This Court, in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d (1976), granted Certiorari to an appeal by the State of South Dakota of a ruling by the South Dakota Supreme Court. This Court

reversed the ruling of the state supreme court that evidence seized from a car had been obtained in violation of the Fourth Amendment, as made applicable to the states by the Fourteenth.

This Honorable Court, relying upon Carroll v. United States, supra., and Chambers v. Maroney, supra., again emphasized the mobility doctrine and also stated (at 428 U.S. 367), "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

The Opperman holding clearly reflects a concern by this Honorable Court when a state court, relying upon the federal Constitution, misinterprets the holdings of the U.S. Supreme Court.

This Court should grant certiorari in the case at bar to ensure that its holdings are fairly applied by the Colorado Supreme Court.

Respectfully submitted,

Thomas A. Barnes, Jr.
Deputy District Attorney

EXHIBIT "A"

IN THE SUPREME COURT OF COLORADO
NO. 70SA556

THE PEOPLE OF THE STATE)
OF COLORADO,)
Plaintiff-Appellant,)
)
vs.)
)
PETER RODNEY BANNISTER)
Defendant-Appellee.)

Interlocutory Appeal from
the District Court of El
Paso County Honorable
John F. Gallager, Judge

EN BANC RULING AFFIRMED

Robert L. Russel, District Attorney
Thomas A. Barnes,
Deputy District Attorney
Attorneys for Plaintiff-Appellant,

Robert M. Moyers
Attorney for Defendant-Appellee

JUSTICE ERICKSON
delivered the Opinion of the Court

This is an interlocutory appeal by the prosecution from an order suppressing evidence seized from the Defendant Peter Rodney Bannister's automobile. We affirm.

In the early morning hours of October 15, 1979, Officer Lopez of the Colorado Springs Police Department observed a 1967 Pontiac GTO automobile containing two occupants and proceeding at a high rate of speed. Before the officer could engage in pursuit, however, the vehicle disappeared from his sight. Shortly thereafter, the officer overheard a police radio dispatch which reported a theft of motor vehicle parts in the area he was patrolling. The dispatch reported that among the items stolen were a number of chrome lug nuts. The reports also gave a description of the two persons suspected of the theft.

Within minutes of the report, Officer Lopez again saw the Pontiac GTO that he had attempted to pursue earlier containing the same two occupants. The vehicle entered a service station at a high rate of speed. Officer Lopez stopped the

vehicle, which was driven and owned by Bannister, for the purpose of issuing a traffic citation to him.

When Officer Lopez approached the vehicle, both of the vehicle's occupants got out of the car. Officer Lopez first questioned Bannister and then looked into the Pontiac GTO where he allegedly saw chrome lug nuts in plain view in an opened glove compartment. At that time, the officer concluded that the vehicle's occupants matched the description which he had heard in the police dispatch relating to theft of motor vehicle parts. Officer Lopez arrested Bannister and the passenger, handcuffed them, and placed them in the rear seat of his police cruiser. He subsequently searched the vehicle and seized several lug wrenches and the chrome lug nuts.

Prior to his trial for theft of motor vehicle parts, Bannister moved to suppress the items seized by Officer Lopez. Relying on our decision in People v. Neyra, 189 Colo. 367, 540 P.2d 1077 (1975), the trial court properly granted the motion, finding that no exigent circumstances existed to justify the warrantless search. [1]

One of the most fundamental rules in Fourth Amendment jurisprudence is that, subject only to a few specially established and well-delineated exceptions, searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). These exceptions have been "jealously and carefully drawn," Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), and they have been limited in their search to that which is necessary to accomodate the identified needs of society. Arkansas v. Sanders, __U.S.__, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). In all cases, the burden has been squarely placed on those seeking the exemption from warrant requirements to show that there is a need for it. - United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); People v. Casias, 193 Colo. 66, P.2d 926.

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1 The passenger in the Bannister vehicle was also charged with theft of motor vehicle parts

and he joined with Bannister in moving for the suppression of the evidence seized by Officer Lopez. Because the passenger did not assert a possessory interest in the items seized, he was denied standing to challenge the seizure. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.,2d 387 (1978). The propriety of the trial court's ruling has not been challenged on appeal. We note that this Court has not yet considered whether the standing limitations imposed by Rakas v. Illinois, supra, apply to suppression motions based on the provisions of Article II, section 7 of the Colorado Constitution.

(1977); People v. Alexander, 193, Colo. 27, 561 P.2d 1263 (1977).

The prosecution asserts on appeal that the warrantless search and seizure conducted by Officer Lopez was valid because the articles seized were in plain view. In People v. Neyra, 189 Colo. 367, 540 P.2d 1077 (1975), however, we held that, while a plain view sighting of contraband or other evidence of a crime may be sufficient to establish the requisite probable cause needed to obtain a warrant, it is not sufficient to justify a warrantless entry into a vehicle to seize evidence. See also, People v. Hicks, Colo. _____, 590 P.2d 967 (1979); People v. Hampton, 196 Colo. 466, 587 P.2d 275 (1978); People v. Railey, 178 Colo. 297, 496 P.2d 1047 (1972). Relying on the Supreme Court's statement in the plurality opinion in Coolidge v. New Hampshire, supra, we stated in Pople v. Neyra that:

> "The limits on the plain view doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never

> enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'"

Thus, given the finding by the trial court that no exigent circumstances existed, there was no constitutional justification for the warrantless search and seizure.[2] Indeed, as we stated in People v. Lorio, 190 Colo. 373, 546 P.2d 1254 (1976) "even if the evidence was in plain view, the police

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[2] The state asserts that in People v. Waits, 196 Colo. 35, 580 P.2d 391 (1978) this Court did not address the issue of exigent circumstances and did not follow People v. Neyra, supra, insofar as it required the presence of exigent circumstances to justify a plain view search.

> Although we recognize that the result reached in Waits could be construed as rejecting the requirement of exigent circumstances, we reaffirm the rule set out in Neyra and disapprove any language in Waits to the contrary.

officers had time to secure a search warrant, and their failure to do so stripped them of lawful authority to enter the vehicle and seize the contested evidence."

Accordingly, the ruling of the trial court is affirmed.

Justice Rovira does not participate.

EXHIBIT "B"

COLORADO APPELLATE RULES 4.1
INTERLOCUTORY APPEALS
IN CRIMINAL CASES

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

EXHIBIT "C"

IN THE SUPREME COURT
STATE OF COLORADO
No. 79SA556

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellant, vs. PETER RODNEY BANNISTER, Defendant-Appellee.	MOTION TO VACATE REMITTITUR

COMES NOW, the People of the State of Colorado, by and through Robert L. Russel, District Attorney within and for the Fourth Judicial District, and by his duly appointed Deputy, Thomas A. Barnes Jr., and moves to vacate the remittitur ordered in this case on March 3, 1980.

As grounds for this motion, the People allege:

1. That C.A.R. 4.1(g) prohibits a petition for rehearing on interlocutory appeals in criminal cases.

2. That the opinion of the Supreme Court of Colorado, issued March 3, 1980, is, therefore, a final judgment.

3. That the People of the State of Colorado intend to seek review of said final judgment by filing a Petition for Writ of Certiorari in the Supreme Court of the United States.

4. That this matter should, therefore, not be remitted to the trial court until completion of review by the Supreme Court of the United States.

WHEREFORE, the People respectfully request that this Honorable Court vacate its order of remittitur in this matter.

Respectfully submitted,

ROBERT L. RUSSEL (3043)
District Attorney

By: Thomas A. Barnes, Jr.
Thomas A. Barnes, Jr.
Deputy District Attorney
(6590)

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing Motion to Vacate Remittitur to Mr. Robert M.

Moyers, at 303 South Cascade, Colorado Springs, CO. 80903, on this 18th day of March, 1980.

Dena M. Peck

EXHIBIT "D"

IN THE SUPREME COURT
OF THE
STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellant,	)
vs.	) INTERLOCUTORY) APPEAL FROM) THE DISTRICT
PETER RODNEY BANNISTER, Defendant-Appellee.	) COURT, EL PASO) COUNTY

Upon consideration of the Motion to Vacate Remittitur filed herein, and now being sufficiently advised in the premises,

It is This Day Ordered that said Motion shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MARCH 27, 1980.

cc: Thomas A. Barnes, Jr.
Deputy District Attorney
Judicial Building
20 East Vermijo
Colorado Springs, CO 80903

Robert M. Moyers
303 South Cascade
Colorado Springs, CO 80903

Clerk of the District Court
El Paso County
20 East Vermijo
Colorado Springs, CO 80903

Supreme Court
State of Colorado
Certified to be a full, true and correct copy, March 28, 1980, David W. Brezina, Court Clerk of the Supreme Court Seal by K. Eldredge, Deputy Clerk.

CERTIFICATE OF SERVICE

I do hereby certify that on the 30th day of May, 1980, I placed in the United States mails, postage prepaid and properly sealed and addressed, a true and correct copy of the foregoing Petition for Writ of Certiorari to:
ROBERT M. MOYERS, Attorney for Defendant-Respondent, 303 South Cascade, Colorado Springs, CO 80903.

THOMAS A. BARNES, JR.
Deputy District Attorney

FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Defendant-Respondent, PETER RODNEY BANNISTER, by and through his attorney ROBERT M. MOYERS moves this Court for an order permitting him to proceed in this Court, in forma pauperis, in connection with the Petition for Certiorari from the judgment of the Colorado Supreme Court entered in this cause on March 3, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the Affidavit of said Appellant.

Filed herewith is Defendant-Appellant's Response to the Petition for Writ of Certiorari.

Respectfully submitted,

Robert M. Moyers

Robert M. Moyers
Attorney for Peter Rodney Bannister
303 South Cascade Ave.
Colorado Springs, Colorado 80903
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IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN THE SUPREME COURT OF THE UNITED STATES IN FORMA PAUPERIS

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

PETER RODNEY BANNISTER being duly sworn, deposes and says:

1. I am a citizen of the United States and the Defendant-Respondent in the above-entitled action.

2. I am aware that the PEOPLE OF THE STATE OF COLORADO desire to prosecute an appeal from the judgment entered by the Supreme Court of the State of Colorado, and that a Petition for Certiorari is pending before this Court.

3. Because of my poverty I am unable to pay the costs of responding to said appeal and still be able to provide myself and my dependents with the necessities of life.

4. I contend that the holding of the Supreme Court of the State of Colorado was not in error in this matter, and that it should be affirmed, and that I should be given an opportunity to respond to the Petition for Certiorari herein.

WHEREFORE, Affiant prays that he may have leave to proceed in this Court on appeal in forma pauperis.

Peter R Bannister
Peter Rodney Bannister

STATE OF COLORADO)
COUNTY OF EL PASO) ss.

PETER RODNEY BANNISTER, being first duly sworn, upon oath, deposes and says that he is the Defendant-Respondent in the foregoing Affidavit in Support of Motion to Proceed in the Supreme Court of the United States in Forma Pauperis, that he has read same and that the statements contained therein are true.

Peter R Bannister
Peter Rodney Bannister

Subscribed and sworn to before me this 28 day of July, 1980.

My commission expires: 3-10-84

Notary Public

Supreme Court, U.S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	ON PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI FROM JUDGMENT OF COLORADO SUPREME COURT

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IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	)	ON PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

COMES NOW the Respondent above named by and through his attorney ROBERT M. MOYERS and in response to the Petition for Writ of Certiorari herein states as follows:

OPINION BELOW

The Opinion delivered in the Court below is reported as 607 P. 2d 987 (1980), and is appended to the Petition for a Writ of Certiorari. The Opinion was delivered March 3, 1980, Opinion No. 79SA556. On March 28, 1980 the Colorado Supreme Court denied Petitioner's Motion to Vacate Remittitur, also appended to the Petition for a Writ of Certiorari.

JURISDICTION

Petitioner invokes Rule 19(1)(a) of the Rules of this Honorable Court as the Jurisdictional basis for review. While Respondent does not question the timeliness of the filing of the writ, Respondent feels that Rule 19(a)(1) is inapplicable because the Federal questions decided by the Colorado Supreme Court were

decided in accordance with applicable prior decisions of this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED

Respondent feels that the question presented by the Petition is the same question presented in Respondent's Motion to Suppress Evidence filed in the trial court, namely: was the warrantless search of Respondent's motor vehicle and the seizure of evidence therefrom prohibited and illegal under the Fourth Amendment of the Constituion of the United States and the judicial interpretations thereof?

STATEMENT OF THE CASE

In the early morning hours of October 15, 1979 Officer Lopez of the Colorado Springs Police Department obsered a 1967 Pontiac GTO automobile containing two occupants and proceeding at a high rate of speed. Before the Officer could engage in pursuit, however, the vehicle disappeared from his sight. Shortly thereafter, he overheard a police radio dispatcher reporting a theft of motor vehicle parts in the area he was patrolling. The dispatcher reported among the items stolen were a number of chrome lug nuts. The report also gave a description of the two persons suspected of the theft. Shortly thereafter Office Lopez

again saw the Pontiac GTO he had attempted to pursue earlier containing the same two occupants. The vehicle entered a service station at a high rate of speed, and the Officer stopped the vehicle, which was driven and owned by Defendant Bannister, for the purpose of issuing a traffic citation to him. As the Officer approached the vehicle, both parties exited. A conversation between Bannister and Officer Lopez took place just outside the left front door of the vehicle, which at the time was closed. The Officer observed chrome lug nuts in an opened glove compartment inside the vehicle as well as two tire irons on the floorboard of the back seat. All of these items were in plain view illuminated by the lights of the service station. The Officer thereupon arrested Bannister and the other occupant of the vehicle, and placed them in the rear seat of his police cruiser. He then searched the automobile without benefit of a warrant, seizing the lug nuts and tire irons. Prior to his trial for theft of motor vehicle parts, Defendant Bannister moved to suppress the items seized by the Officer. The trial court granted the motion, and upon appeal to the Colorado Supreme Court, the trial court's ruling was affirmed. Thereafter the People of the State of Colorado filed the Petition for Writ of Certiorari with this Honorable Court.

ARGUMENT

IN AFFIRMING THE TRIAL COURT'S SUPPRESSION ORDER, THE COLORADO SUPREME COURT DID NOT ESTABLISH A NEW STANDARD OF SEARCH AND SEIZURE, BUT RATHER PROPERLY APPLIED BOTH FEDERAL AND STATE JUDICIAL INTERPRETATIONS OF THE FOURTH AMENDMENT AS APPLIED TO WARRANTLESS AUTOMOBILE SEARCHES.

Petitioner contends that the Colorado Supreme Court by suppressing evidence in this case established a standard of search

moment of its seizure does not indicate that the "plain view" doctrine applies. In Coolidge, this Honorable Court emphasized that the "plain view" doctrine was subject to the limitations that plain view is never enough to justify the warrantless search and seizure of evidence, and that the discovery of evidence in plain view must be inadvertent. The Court emphasized that while the seizure of a particular object might be justified whether the object was observed in plain view following an initial intrusion which was legitimated either by a warrant or such exceptions to the warrant requirement as hot pursuit or search incident to arrest, the plurality stated that to extend the scope of such an intrusion to the seizure of objects not contraband nor stolen nor dangerous in themselves which the police knew in advance they would find in plain view and which they intended to seize would fly in the face of the basic rule that no amount of probable cause can justify a warrantless search. In its brief, Petitioner claims that the instant case differs from Coolidge. It is, however, similar in one crucial regard: in neither did there exist exigent circumstances justifying a warrantless search. In the instant case Defendant Bannister was out of the vehicle with the door closed at the time he first encountered Officer Lopez, and at the time Officer Lopez conducted the search of Bannister's behicle, Bannister was under arrest and in the police cruiser. The opportunity for search was thus hardly fleeting. The items seized were not seized pursuant to an inventory search of the kind involved in South Dakota v. Opperman, 428 U. S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Because Bannister's vehicle was in a well-lighted area, not on a highway, and the occupants of the vehicle were already under arrest and in police custody, the case is distinguishable also from Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280,

69 L. Ed. 543 (1925) and Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) for, as this Honorable Court stated in Coolidge at 403 U. S. 479:

> Carroll, on its face, appears to be a classic example of a doctrine that warrantless searches are per se unreasonable in the absence of exigent circumstances. Yet if we take the viewpoint of a judge called on only to decide in the abstract, after the fact, whether the police have behaved "reasonably" under all the circumstances - in short if we simply ignore the warrant requirement - Carroll comes to stand for something more. The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants. Carroll held such an interference to be reasonable without a warrant, given probable cause. It may be thought to follow a fortiori that the seizure and search here - where there was no stopping and the vehicle was unoccupied - were also reasonable, since the intrusion was less substantial, although there were no exigent circumstances whatever. Using reasoning of this sort, it is but a short step to the position that it is never necessary for the police to obtain a warrant, before searching and seizing an automobile, provided they have probable cause.

Essentially Petitioner is urging the adoption of a "reasonableness" test to determine the validity of warrantless searches, rather than the test applied in Coolidge. In the instant case, it may have been inconvenient or time consuming for the police to obtain a warrant, but not impossible. There was no danger of the car being tampered with. Unlike Opperman, there was no indication of valuables in the vehicle that required an immediate inventory search.

In its Petition, Petitioner repeatedly states that Coolidge is inapplicable to the instant case, yet it is never made clear how the two differ, except that in the instant case some of the items seized were allegedly stolen. This Honorable Court has repeatedly held that plain view is never enough to justify a warrantless automobile search, and there are no additional factors present to redeem the police conduct here. Since Bannister was already

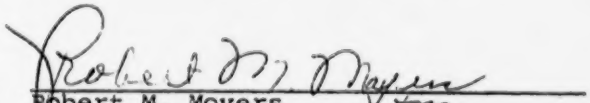
under arrest, the search here cannot be justified as a search incident to arrest. Since the car was stopped, with all occupants out of the vehicle, and since it was parked in an area where the police would have had no problem preventing its being tampered with until the warrant were obtained, the theory that the search is justified as a "fleeting" opportunity also fails.

In the instant case the Colorado Supreme Court has adopted the reasoning of Coolidge in suppressing the evidence seized. An analysis of Petitioner's argument reveals that it is not the method used by the Colorado Supreme Court to arrive at its decision to which Petitioner objects, but rather that Court's refusal to condone the search, in the absence of any findings of exigent circumstances by the trial court, solely on the "plain view" theory. Such a ruling by the Colorado Supreme Court would indeed conflict with this Honorable Court's declarations in Coolidge. No new standard has been advanced by the Colorado Supreme Court in affirming the suppression order, and contrary to Petitioner's position, a "contorted" reading of Coolidge was not necessary to reach the finding that the Court made. Petitioner seems to forget that the burden of proof in justifying a warrantless search is on the prosecution, not the defendant, and that in the instant case, the only theories advanced by the prosecution to justify this warrantless search were the "plain view" doctrine and search incident to arrest (this argument has apparently been abandoned in this Petition); that theory was held insufficient by the Colorado Supreme Court based upon what this Honorable Court has stated in Coolidge.

It is respectfully requested that this Court not grant the Petition for Certiorari herein, because Petitioner has failed to show that the Colorado Supreme Court has decided a Federal

question in conflict with the prior decisions of this Honorable Court. Rather, all that the brief of the Petitioner shows is that the Colorado Supreme Court was asked to justify a warrantless automobile search solely on the basis of the plain view doctrine, which, on the facts in the instant case and based upon the prior rulings of this Honorable Court, would have in fact been contrary to the law.

Respectfully submitted,



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